IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 733 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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HUSSAIN MOHAMMED DHOBI - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MA KHARADI for Appellant(s) : 1 .
MR JM PANCHAL,SPL PP Assisted by MR RC KODEKAR, APP for respondent

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA
and
HONOURABLE MR.JUSTICE MD SHAH
Date : 25/01/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. By way of filing the present appeal, the appellant-Hussain Mohammed Dhobi, the original accused No.25, has challenged the

impugned order passed by the learned Special Judge (POTA), Ahmedabad, in Criminal Misc. (Bail) Application No.3480 of 2003 in POTA Case No.1 of 2003 whereby the application filed by the appellant for bail was rejected.

2. The appellant-Hussain Mohammed Dhobi, the original accused No.25, was arrested on 28-2-2002 in connection with the FIR being I.C.R.No.9 of 2002 for the offences punishable under Secs.143, 147, 148, 149, 337, 338, 334, 153-A, 302 and 307 of the IP Code, Secs.141, 151 and 152 of the Indian Railways Act, Secs.3 and 4 of the Prevention of Damages to Properties Act and under Secs.3(2) and 3(3) of the Prevention of Terrorism Act, 2002 for the alleged offence of burning of coach No.S/6 of the Sabarmati Express on 27-2-2002 at 7.45 a.m. near “A” Cabin at Godhra Railway Station resulting in the death of 59 persons and causing serious injuries to 48 persons and also causing

damage to the railway properties.

3. Since detailed discussion of the version given in the police papers has been made by the learned Special Judge (POTA), the same are again not reproduced in this judgment. When the train reached the Godhra Railway Station at about 7.43 a.m. i.e. much later than its scheduled time of 2.55 a.m. and after the train started at 7.48 a.m., the chain was pulled around 7.50 a.m. The train started again at 7.55 a.m. but after some distance, the chain was pulled again simultaneously from four compartments at 7.58 a.m. and it stopped only about 332 meters away from the platform near “A” Cabin and the incident is alleged to have happened around 8.00 a.m. when a large number of people from a nearby area including from Signal Faliya had attacked and set on fire the said S/6 compartment. The police papers state that petro cans which were stored in the nearby

Aman Guest House in the previous evening were used for setting the compartment on fire. At the time when the train halted, members who wanted to attack the compartment from the mob, pelted stones, banged iron pipes, lathis etc. and by cutting open the vestibule, entered the S/6 compartment, poured inflammable substances like petrol in it and set it on fire. The persons forming an unlawful assembly tried to prevent the passengers from getting down from the burning coach. R.P.F. and other police people reached on the spot and tried to control the mob by firing a few shots. However, the incident appears to have occurred in a very well planned and swift manner, because, within few minutes of halting of the train, it was attacked by a huge mob, armed with lethal weapons and cans of inflammable materials like petrol, kerosene and acid were soon brought and S/6 compartment was set ablaze

wherein 59 persons were charred and 48 persons were seriously injured.

4. The FIR was lodged by the engine driver Rajendrarao Raghunantrao Jadav at about 9.35 a.m. on 27-2-2002. A report under Sec.173(2) of Criminal Procedure Code (“Code” for short) was submitted by police on 22-5-2002 qua 54 accused. Reports/Supplementary charge sheets under Sec.173(8) of the Code were sent qua seven accused on 20-9-2002; qua three accused on 19-12-2002, qua two accused each on 16-4-2003 and 4-5-2003, qua one accused on 19-5-2003, qua six accused on 3-10-2003, qua two accused on 11-7-2004 and qua three accused on 3-9-2004. Earlier on 2-3-2002, Dy. S.P., Western Railway, requested the Judicial Magistrate (First Class) to add offence under Sec.3(1)(a)(b) of the Prevention of Terrorism Ordinance 2001 (POTA, 2001). Thereafter on 25-3-2002, a communication was sent to learned Judicial Magistrate to keep in

abeyance the said provisions of POTA, 2001 at that stage. Thereafter, a request was made by the Dy. S.P., Western Railway to add the offences under Section 3(2)(3) of the Prevention of Terrorism Act, 2002 (hereinafter referred to as “the Act” for short)vide communication dated 18-2-2003 addressed to the learned Addl. Sessions Judge.

5. In view of the provisions of Sec.56 of the Act, the provisions of the Act have an overriding effect over the provisions of any other enactment. Secs.49(6) and 49(7) of the Act impose additional restrictions on granting of bail. However, in view of the proviso to Sub-section (7), these restrictions will not apply after the expiry of one year from the date of detention of the accused for an offence under the Act. The bail application in this case was made admittedly one year after the accused was

detained.

6. Prior to filing of this appeal, the appellant preferred his application for bail before Addl. Sessions Court, Godhra, vide Ex.5 in Sessions Case No.172 of 2002. However, it was rejected. Thereafter, he preferred Criminal Misc. Application No.8990 of 2003 in the High Court. However, as the supplementary charge sheet has been filed, he was directed to approach the court below. He therefore preferred another application for bail vide Ex.164 in Sessions Case No.172 of 2002. Criminal Misc. Application No.863 of 2003 in this Court which was also rejected. However, it was rejected. Thereafter, as the provisions of POTA Act was invoked by the investigating agency, he preferred Criminal Misc. Application No.463 of 2004 into the Court of Special Judge, POTA, under Section 49 of the POTA Act. However, it was rejected by the Court below. Hence, the present appeal

has been filed by the appellant.

7. While rejecting the said application, the learned Special Judge (POTA) observed that only one witness, ASI Chhatrasinh Gambhirsinh (P.W.No.184), had specifically named the appellant vide his statement recorded on 27-2-2002. He was discharging his duty at the relevant time and hence, at present his presence cannot be doubted. The appellant was found with a wooden stick. If he was there out of curiosity, there was no necessity to carry the weapon with him. It was further held by the court below that there was not only the criminal conspiracy to burn the train but there was preparation to execute the said conspiracy on the previous day and before. The factors such as purchase of petrol, collection of the same at a secret place, gathering of information about arrival of the train, instigating people under the pretext of abduction of a girl, stopping the

train at the area where dominantly people of particularly community resided and gathering of a huge crowd within no time at the place of the incident were taken into consideration by the court below coupled with the fact that admittedly 59 persons were killed of whom 27 were children and women. The appellant was arrested with the weapon. It was also held by the court below that the appellant was not a regular passenger travelling in the train but was there as part of the unlawful assembly for execution of conspiracy. Since the prima facie involvement of the appellant was found from the statement of the witness, ASI Chhatrasinh Gambhirsinh (P.W.No.184), his bail application was rejected.

8. We have heard learned counsel for the appellant, Mr.Kharadi and learned Special Public Prosecutor, Mr.J.M.Panchal, for the respondent-State assisted by learned APP,

Mr.R.C.Kodekar.

9. Mr.Kharadi, the learned counsel for the appellant, submitted that there is no evidence against the present appellant and no discovery or recovery has been effected from him. He further submitted that there is the statement of only one eye-witness who named the appellant. Except the statement of this witness, there is nothing against him and, therefore, he should be enlarged on bail. According to him, no test identification parade was held at any point of time and the accused is alleged to have been present with stick. However, there is no discovery in the eye of law. Hence, according to him, there is no iota of evidence to connect the present appellant with the crime in question. He further submitted that there are two types of conspiracies in the present incident out of which, the present appellant was not shown as conspirator in the first part of conspiracy.

According to him, the appellant can at the most be connected with the second part of conspiracy and that too vis-a-vis the evidence of only one witness and hence, the role of the appellant cannot be considered with the core group who had allegedly conspired the main offence. He further submitted that there are no other independence evidence connecting the appellant with the crime in question. Taking us through the above referred statement and other statements upon which reliance has been placed apart from the reliance placed on reasoned order passed by the court below, he submitted that the appellant is totally innocent but he has been involved in the crime in question only on the ground of he being from the minority community.

10. Learned Special P.P. Mr.J.M.Panchal, assisted by the Learned Additional Public Prosecutor, Mr.R.C.Kodekar, submitted that there is a

conspiracy revealed from the secret statement, copy of which is already supplied to the other side. It is the case of prosecution that in pursuance of the conspiracy, S/6 compartment of the Sabarmati Express was set on fire. He further submitted that it was the intention of the accused that the persons who travelled in the train roasted alive. Moreover, the fire brigade when called was also not permitted to put out the fire and was stopped by the crowd. There is no mistaken identity as the witness knew the accused from the beginning and the name of the accused is made amply clear by the witness and, therefore, no benefit can be given to the accused in the absence of test identification parade. He also took us to Section 120(b) of the I.P.C. and submitted that mere presence of the accused would be sufficient to involve the accused in crime in question. In this regard, he took us through

part of the order of the trial court and argued that it is a well reasoned order where the court below has considered the question of conspiracy on the basis of evidence on record and on placing reliance on catena of decisions of the Honourable Apex Court. He also took us through the specific statements of PW-223, PW-224, PW-225, PW-374 and PW-375 and submitted that there is no possibility of creating any evidence. He further submitted that the statement of witness recorded on 27-2-2002 specifically mentioned the name of the accused together with his role in the incident. The said statement is very specific and categorical about the role of this accused not as a mere passive onlooker but the person present in the mob with stick. He further submitted that this is not the stage for the Court to appreciate the evidence and it can be done at the time of trial. He has submitted that there was no

personally enmity between the passengers and the accused. No overt act according to the learned Special P.P. is a must if a person knowingly abates and instigates and hence, he certainly would be responsible under same. It is therefore requested that this appeal be rejected. He also submitted that there was the statement of witness recorded under Secs.164 of the Code and Sec.32 of the Act as regards the nature of conspiracy. Generally there will not be any direct evidence as regards hatching of conspiracy is concerned. Here in this case, according to him, there are evidence on record to that effect also. He submitted that there was sufficient prima facie material to show that a watch was being kept for the arrival of the train as a part of conspiracy. Taking us through the relevant papers, he submitted that 7-8 containers of petrol of 20 litres each were brought in the previous night and stored at

the Aman Guest House, which is very near to the place of the incident. To stop the train near “A” Cabin, i.e. the place convenient to attack from the nearby Signal Faliya and other localities, chain pulling was done in four compartments. The mob was instigated to carry on their attack by announcements from a nearby mosque. The movement of containers in which inflammable material was brought and the compartment was set on fire were seen by various witnesses. According to him, the gathering of such a huge mob and attacking with lethal weapons by setting the compartment on fire with inflammable substances within minutes of halting the train would clearly establish the formation of an unlawful assembly and hatching of conspiracy to achieve the common object. Because of the incident, riots broke out in the city and the injured had to be looked after and inquest panchnama was to be

drawn. Apart from that, several persons were taken in custody on the spot and in view of the magnitude of the incident, arrest panchnamas could not be drawn immediately but could be drawn later on in the evening and statements of the police personnel apprehending some of the accused on the spot were recorded on 1.3.2002. In view of the aforesaid, it cannot be said that the evidence appearing against the appellant is concocted. Lastly, he submitted that the presence of the present appellant with his active role has been prima facie established along with weapon and, therefore, he should not be released on bail looking to his direct involvement into the crime in question.

11. The entire record pertaining to the case has been gone in detail by us. The submissions made by the learned counsel appearing for the respective parties were also considered by us. We would not be able to opine on the

reliability or otherwise of the evidence on any argumentative grounds. According to us, statements recorded of the witnesses under Section 164 of the Code and under Section 32 of the Act as well as other record prima facie indicate that substantial quantity of inflammable substance like petrol had been accumulated at a nearby place prior in point of time and immediately the train was halted by pulling chain at about 8.00 a.m. on 27-2-2002, S/6 compartment was set on fire with the same. It is clear from the statements that two meetings had taken place in the Aman Guest House, Signal Faliya, Godhra in the night of 26-2-2002 from where specific instruction of Maulvi Hussain Umarji for setting S/6 compartment of the Sabarmati Express coming from Ayodhya on fire was communicated by Haji Bilal and Faruk Bhana. The owner of the guest house and his accomplice were given the work of collecting

petrol in the night of 26-2-2002 itself and 140 litres of petrol were collected from a nearby petrol pump and kept in Aman Guest House in the night of 26-2-2002 and as a part of conspiracy, the movement of train was verified from the Godhra Railway Station in the early hours of 27-2-2002. Soon after the first chain pulling was done at the platform immediately after the train started, the chain pulling was done simultaneously from various compartments. Thereafter, the petrol cans stored at Aman Guest House were taken in a goods rickshaw near the "A" cabin and the compartment was set on fire by putting burning rags inside the compartment and through broken windows by the miscreants. Some of the miscreants forcibly entered the compartment by cutting open the vestibule and poured the petrol there. None of the passengers were permitted to come out from the compartment by the miscreants by

creating a terrorized atmosphere and also by beating them and pelting of stones. In order to instigate the mob, provocative slogans were announced through the loudspeaker from a nearby mosque. As a consequence of the above referred incident, 59 persons were charred to death and 48 persons were seriously injured apart from causing damage to the railway properties.

12. From the aforesaid, it is prima facie established that there is sufficient material to indicate that conspiracy was hatched for attacking the compartment in which Kar Sevaks were travelling from Ayodhya and that inflammable material was collected on the previous night of 27-2-2002 in the Aman Guest House, which was very near to "A" cabin where the train was halted after simultaneous pulling of chain from four compartments and where a mob of 900 persons attacked the train and some of them set the

S/6 compartment on fire by using petrol collected in the previous evening and the whole conspiracy was successfully completed. All the aforesaid prima facie indicate that it was a well thought out plan for achieving the common object of committing the crime in question.

13. On an evaluation of the facts and circumstances narrated hereinabove, we are of the opinion that the role attributed to the appellant along with the weapon has been established from the prima facie evidence appearing on record. There is a recovery of stick from the appellant. Apart from the above, the presence of the appellant and his active role has been established from the statement of witness. It is not his case that he was the passenger travelling in the train. It is also not his case that he was part of the team which had gone to welcome those returning from Ayodhya. Further, it is not

his case that he was there at the Railway Station for any social cause. However, it is clear from the evidence prima facie appearing on record that he was there as part of the unlawful assembly for fulfilling their common object hatched in the conspiracy. Hence, if the appellant is released on bail, it is more likely that he may not be available for trial looking to the facts that case against the appellant has been prima facie established. It may be noted that some accused are still absconding. We have also considered the impact on the witnesses and the society and also the punishment that might be awarded. We have also considered that some accused are still absconding and are to be apprehended.

14. In the entirety of the facts and circumstances narrated hereinabove, we are of the opinion that the impugned order passed by the learned Special Judge (POTA) is just and proper and no illegality has been

committed warranting interference by this Court in this appeal. This appeal is therefore required to be rejected.

15. This appeal is hereby rejected.

16. Since the observations by this Court in this judgment are made for the purpose of deciding this appeal, the same may not prejudice the parties in trial.

(R.P.DHOLAKIA,J.) (M.D.SHAH, J.)

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